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CONSTITUTIONAL ANALYSIS OF THE FCC'S NOTICE OF PROPOSED RULEMAKING, FCC 99-141

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EXECUTIVE SUMMARY

The NPRM proposes a number of rules that, if promulgated, would take the private property of building owners without providing them just compensation. While these rules vary in the nature and extent of the uncompensated taking they would effect, all of them share the characteristic of requiring building owners to acquiesce to the presence of an uninvited person on their private property. The Supreme Court's decisions under the Takings Clause of the Fifth Amendment of the Constitution leave no doubt that such forced access rules automatically constitute a taking of property requiring just compensation.

The Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), established that a law authorizing a telecommunications carrier to effect a permanent physical occupation of private property constituted a *per se* taking of private property under the Takings Clause. The decision, which dealt specifically with the installation of cable wiring on top of a building, left no doubt that such an invasion of real property always effects a taking, regardless of how small the physical occupation may be in relation to the remainder of the owner's estate.

It is an equally central tenet of eminent domain law that property rights are defined not by the Takings Clause or by any particular regulatory regime, but

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rather by existing rules or understandings that stem from an independent source such as state law. The significance of this central principle is that the FCC is not free to restrict a property owner's rights simply by making general findings or conclusions as to the extent of what a landowner's property interests should be in light of the FCC's regulatory goals, but rather must respect whatever property rights are recognized under local law—such as the right to grant limited access only to specific telecommunications providers, or the right to enter into leases with restrictive covenants—and may not infringe upon those rights without implicating the Takings Clause.

Accordingly, if it is clear under relevant property law that a landowner has the right to exclude new telecommunications providers from his property, then, notwithstanding the existence of a grant to an incumbent provider, the FCC cannot require the landowner to provide nondiscriminatory access to all other providers, at least not without providing just compensation for the property interest being taken. There is no authority for the proposition that a property owner can be forced to provide nondiscriminatory access without implicating the Takings Clause, and the decision in *Loretto* plainly dictates that such a nondiscriminatory access provision would constitute a *per se* taking of property. The same result applies in the case where a telecommunications provider who has obtained a limited access license from a landowner is required to allow other providers to “piggyback” on his access rights, or in the case where a landlord has

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entered into a lease that prohibits tenants from installing certain telecommunications equipment on their balconies. In both instances, so long as it is clear under local property law that the landowner has retained the right to exclude other providers or to prohibit the installation of certain equipment, the FCC cannot infringe on those rights by mandating physical access without creating a *per se* taking under the holding in *Loretto*.

In addition to creating a *Loretto* taking, the NPRM's proposals also would be found to constitute a taking of property if analyzed under the balancing test applied to non-*per se*, regulatory takings. Building owners have a reasonable, investment-backed expectation that they have the right to control and manage the delivery of telecommunications services to their tenants, and have every incentive to actively engage in the performance of this function so as to attract and retain tenants (or, as they are increasingly called, "customers"). For this reason, the FCC cannot promote the interests of the telecommunications industry over those of the real estate industry without running afoul of the regulatory takings doctrine, which seeks to prevent the government from unfairly benefiting one interest group over another.

The Telecommunications Act of 1996 does not provide the FCC with the authority to exercise the power of eminent domain, and there is ample Supreme Court precedent holding that such a power cannot be inferred from a statute that in no way gives an agency the power to effect takings. For this reason, the

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Commission cannot rely solely on its general jurisdiction to enforce the Telecommunications Act in order to implement the rules in the NPRM that would effect takings of the private property of real property owners.

This result is underscored by the fact that, although the promulgation of the NPRM's proposals would create the largest liability for the government ever triggered under the Takings Clause, Congress gave no indication in the Telecommunications Act that an award of just compensation to real property owners was required or expected. Indeed, although this legislation was enacted after the D.C. Circuit held that the Commission did not have authority to issue collocation rules that would constitute a taking of the property of incumbent carriers, there is nevertheless nothing in the statute that could plausibly authorize the Commission to take property from, and then pay just compensation to, owners of real estate. While the rate-making measures in the act may lead to a different conclusion with respect to the authority to take property from incumbent carriers, the Commission has no similar ability to compensate landowners.

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I. INTRODUCTION

In its Notice of Proposed Rulemaking, FCC 99-141 ("NPRM"), the Federal Communications Commission ("Commission") seeks comment on a number of rules that would significantly impact the rights of property owners. This submission,¹ attached as an exhibit to comments submitted by the "Real Access Alliance," analyzes the extent to which the NPRM implicates the Takings Clause of the Fifth Amendment.

The most far reaching of the NPRM's proposals would require building owners to provide access to their premises to all telecommunications providers on a nondiscriminatory basis. Other proposals include requiring local exchange companies ("LECs") and other public utilities to make their in-building facilities available to cable companies and telecommunications providers on nondiscriminatory terms, and extending the rule prohibiting restrictions against tenants installing antennas for video services to cover antennas for non-video services as well.

Underlying the policy proposals contained in the NPRM is the attempt to improve the access rights of all telecommunications providers to residents or businesses located in multiple tenant environments.² In this effort, which is

¹ This submission was prepared by COOPER, CARVIN & ROSENTHAL, but is submitted by the entire Real Access Alliance, including two specific property owners who have attached their own declarations to this exhibit.

² See NPRM, ¶ 29.

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intended to enhance the level of competition and the availability of competitive services, the Commission would override and undervalue the property rights of the owners of the multiple tenant environments. In a number of specific instances, the Commission's proposals would violate the constitutional rights of these owners by taking their property without payment of just compensation. Moreover, the government's liability to pay just compensation that would be triggered by the proposals would almost certainly exceed any amount ever previously awarded under the Takings Clause. Because Congress did not grant the Commission statutory authority to exercise eminent domain powers with respect to real estate owners nor to effectively appropriate the substantial public funds required to pay just compensation, the Commission must limit the extent of its proposal so as not to raise the constitutional concerns described herein.

In order to analyze the manner in which the Commission's proposals overstep the Commission's authority, we first consider how the proposals will effect a taking of private property within the meaning of the Fifth Amendment of the Constitution.

II. THE COMMISSION'S PROPOSALS WOULD LEAD TO THE TAKING OF THE PRIVATE PROPERTY OF BUILDING OWNERS WITHIN THE MEANING OF THE FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution provides that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S.

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CONST., Amendment V. Based on the fundamental principle that some property owners should not be required "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Takings Clause has matured into a robust protection of private property rights against a range of government actions and regulations. In particular, the Takings Clause provides an absolute protection whenever the government appropriates property by authorizing a private citizen to take possession or control of another's private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The Takings Clause is often understood as operating through two distinct doctrines. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). First, it provides an absolute prohibition against uncompensated *per se* takings, which are defined as occurring whenever there is a government-authorized, permanent physical occupation of private property.³ Central to this doctrine is the principle that if the government overrides a property owner's right to exclude others from his property, it has effected a taking, regardless of the level of economic harm suffered by the private party. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A second category of takings is described as "regulatory takings," which are defined according to a balancing test used to

³ Of more recent vintage is a second category of *per se* takings. "When the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the common good, that is, to leave

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determine when a government regulation goes “too far” in burdening a property owner so that “justice and fairness” requires payment of just compensation. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Because determination of a regulatory taking involves a balancing test and a subjective determination, its focus is different from that of a *per se* taking, relying heavily on the extent of economic harm suffered by the property owner, the interference with investment backed expectations, and the importance of the government interest at stake. See, e.g., *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986).

Several of the proposed rules contained in the NPRM would, if promulgated, result in unauthorized takings of the private property of building owners in violation of the Fifth Amendment. Because these proposals require building owners to acquiesce to the physical presence on their premises of uninvited telecommunications providers, they fall squarely within the *per se* takings rule as articulated by the Supreme Court in *Loretto*. Moreover, even if analyzed under the different standards of a regulatory taking, these proposals unfairly transfer substantial economic value from building owners to investors in telecommunications businesses, and thereby unreasonably interfere with the investment backed expectations of the real estate industry.

In sum, the NPRM fails to appreciate that the value of the assets owned by the real estate industry includes as a major component the ability of building

his property economically idle, he has suffered a taking.” *Lucas v. South Carolina Coastal Council*, 505

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owners to manage, and thereby better facilitate, the delivery of a range of services—including telecommunications services—to their customers. In so doing, the NPRM proposes not only to authorize the physical occupation of building owners' property, but also to appropriate assets of substantial economic value to the property owners and to transfer them free of charge to telecommunications companies. Absent this governmental action, these companies would have to pay for these various assets, including access to private property.

(A) The Supreme Court's Decision in *Loretto* Demonstrates The Constitution's Absolute Protection Against A Requirement That Building Owners Provide Uncompensated Access To Their Property By Telecommunications Carriers

In its effort to promote "facilities-based competition,"⁴ the NPRM proposes a number of rules that would require telecommunications carriers to be given forced access to facilities that are either owned by building owners or ceded by them to specific carriers—and not to the public at large.⁵ In doing so, the NPRM implicates over a century of well-established Supreme Court precedent, culminating in *Loretto*, that applies the Takings Clause to any forced expansion of the nation's telecommunications' network, however small, onto or into privately owned property.

U.S. 1003, 1019 (emphasis added); see also *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

⁴ E.g., NPRM, ¶ 1.

⁵ See NPRM ¶¶ 36-48, 52-63, 69.

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In *Loretto*, the Supreme Court held that a New York statute authorizing a cable television company to place cable equipment onto Ms. Loretto's building constituted a taking under the Fifth Amendment. The decision rested upon the following basic principle:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative. *Loretto*, 458 U.S. at 426.

Thus, no balancing test is required where a Government act authorizes a physical occupation of private property. In reaching this conclusion, the Court emphasized that a physical occupation of another's property "is perhaps the most serious form of invasion of an owner's property interests." *Id.* at 435. In discussing the long line of authority that supports the view that "physical intrusions" are property restrictions of "an unusually serious character," the Court paid special attention to the importance of protecting a landowner's "right to exclude." *Id.* at 426. In two places in the opinion, the Court reiterated that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," or "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" See *Id.* at 433, 435 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The decision therefore leaves no doubt that a property owner is

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constitutionally entitled to the right to exclude others from his property, no matter what may be the reasons for, or the degree of, the potential invasion.

It is therefore well established in constitutional jurisprudence that the expansion of the country's telecommunications infrastructure implicates the Takings Clause. Indeed, it has long been held by the Supreme Court, and followed elsewhere as the law of the land, that any rule requiring a land owner to acquiesce to the presence of a telecommunications carrier on his private property constitutes a taking of property under the Fifth Amendment. See *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U.S. 540 (1904); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *GTE Northwest v. Public Util. Comm'n*, 900 P.2d 495 (Or. 1995). The significance of *Loretto* was to make clear that this result in no way depends on the balancing tests applied in other areas of takings law, and also that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436 (emphasis added).

Demonstrating that the size or degree of the physical occupation is of no moment, the Court noted its favorable earlier citation of a decision to the effect that the existence of a single wire stretching over private property—and never touching it—would constitute a taking. See *Loretto*, 458 U.S. at 436, n. 13 (referring to *United States v. Causby*, 328 U.S. 256 (1946) and its approving citation

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of *Butler v. Frontier Telephone Co.*, 186 N.Y. 486 (1906)). Indeed, in *Loretto* itself, the Supreme Court found that a taking occurred even though the total area occupied was less than two cubic feet, and stated that “whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox.” *Loretto*, 458 U.S. at 438, n.16. In short, the *Loretto* rule cannot be avoided by arguing that the physical intrusion is too small or insignificant to matter.

The proposals contained in the NPRM require real property owners to acquiesce to the physical presence of uninvited telecommunications service providers onto their property. As the NPRM observes, “In order to serve customers in multiple tenant environments, telecommunications carriers typically require a means of transporting signals across facilities located within the building or on the landowner’s premises to individual units.” NPRM, ¶ 30 (emphasis added). These facilities consist of, among other things, poles, ducts, conduits, in-building wiring, rights of way, and rooftops. See, e.g. NPRM, ¶ 28, 36, 44. The NPRM’s proposals have as their overarching objective the requirement that such facilities be made fully available to any and all telecommunications carriers so that carriers not previously able to use these facilities will have an unfettered right to do so. To the extent building owners have ownership, under state and local property law, of any of the facilities subject to one of the NPRM’s proposed rules, the NPRM plainly effects a *per se*

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taking of the property of those building owners in accordance with the direct holding in *Loretto*.

The Commission might seek to distinguish *Loretto* from the rules suggested in the NPRM by taking the position that a “nondiscrimination” requirement is somehow different from a “forced access” requirement. The thrust of this argument must be that a property owner loses his right to the *per se* protections of the Takings Clause as soon as he cedes some portion of his property to an outside party. See *In The Matter of Implementation of Section 207 of the Telecommunications Act of 1996*, at ¶ 21. (“OTARD Ruling”). Under this theory, a nondiscrimination requirement should be analyzed not under the authority of *Loretto* but rather under the multi-factor balancing test applied to regulatory takings. This understanding of the Takings Clause is not supportable, however, because under state property law, which is the baseline for any Takings Clause analysis, building owners are clearly authorized to grant limited rights of use and access to tenants or communications carriers. The existence of such limited grants under local property law forecloses the possibility of asserting that, as a matter of constitutional law, access to one party may be understood as access to all similarly situated parties.

- (1) **The Property Rights Of Each Building Owner Must Be Defined Under Applicable State And Local Property Law, Not Under General Principles Identified By The Commission**

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In determining whether the interests of a litigant meet the definition of “property” so as to warrant the protections of the Takings Clause, the Supreme Court has repeatedly emphasized that takings law is not itself the source of this determination. Rather, courts must look to the traditional sources of property law for guidance as to what constitutes private property. For instance, the Supreme Court’s decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), relied on the following basic axiom:

[W]e are mindful of the basic axiom that “[property] interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”

Id. at 1001, citing *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564 (1972).

The full significance of this central precept is that the application of the Takings Clause always requires an inquiry into (or an assumption of) the nature of the underlying property rights as defined under the relevant “independent source,” usually state and local property law. Thus, applying the Fifth Amendment to the disclosure of a trade secret required the Court to assess the significance of Missouri law’s recognition of trade secrets, as defined under the Restatement of Torts, as property. *Monsanto*, 467 U.S. at 1001-1004. Indeed, this principle is consistent with basic federalism principles reflected in the Constitution. Essentially, those principles reflect the Founders’ understanding that the States are the primary source of property rights and that the Federal

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Government is limited by the Constitution in the manner in which it is permitted to restrict or abrogate those rights. Among those limits are the requirement that if property rights are taken within the meaning of the Takings Clause, then just compensation must be paid.

Especially in the case of real property, where the definition of property rights are derived from local statute and common law, the Supreme Court has recognized the importance of local laws in determining when a land-use regulation constitutes a taking. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court stated:

In light of our traditional resort to “existing rules or understandings that stem from an independent source such as state law” to define the range of interests that qualify for protection as “property” under the Fifth and Fourteenth Amendments . . . this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those “existing rules or understandings” is surely unexceptional. When, however, a regulation that declares “off-limits” all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

Id. at 1030 (citations omitted).

In considering whether the Takings Clause applied to a total prohibition on construction on beachfront property, the Supreme Court in *Lucas* rejected any notion that the public benefit of a regulation could be “the basis for departing from our categorical rule that total regulatory takings must be compensated.” *Id.* at 1026. Instead, the Court reasoned that this categorical rule could be avoided

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only if “the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” *Id.* at 1027 (emphasis added). Thus, the “property” that is protected by the Takings Clause is defined in terms of “existing rules or understandings such as state law,” rather than according to some abstract concept developed under either the Takings Clause or the property restriction itself. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

In analyzing whether or not the NPRM’s proposed rules might lead to the “permanent physical occupation” of the “property” of certain building owners, it is therefore necessary to determine the scope of the building owners’ property rights. Specifically, if a building owner has agreed to allow one telecommunications carrier to have access to his building through certain conduits, ducts, and rights of way, has he retained the right to exclude others from those same facilities, or has he irrevocably ceded that right of access to other carriers? Under the accepted rule described in *Board of Regents*, *Monsanto*, and *Lucas*, the question of what rights the building owner has retained must be answered by reference to the terms of the actual agreements he previously made with the carriers to whom he provided access, as those agreements are understood against the “logically antecedent inquiry into the nature of the owner’s estate.” *Lucas*, 505 U.S. at 1027.

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Thus, unless local property law would hold that the building owner, when he agreed to provide access to specific telecommunications and power providers, also made a general grant to all similar carriers, then a newly imposed requirement forcing the building owner to provide nondiscriminatory access to all providers will constitute a taking under the Fifth Amendment. Likewise, the fact that a landowner has rented his building to tenants does not necessarily mean that he has not reserved, either expressly in the lease or implicitly under the facts and circumstances of the lease as analyzed under local law, the right to prohibit his tenants from affixing telecommunications equipment onto certain parts of the building.⁶ In addition, if a building owner agreed to allow access only to one specific telecommunications carrier (or to a specifically identifiable number of carriers), a requirement forcing the carrier to provide all of its competitors access to those in-building facilities would result in a *Loretto*-style taking of the building owner's property. So long as the building owner retained a property right cognizable under local law, the appropriation of that right through the physical presence of an uninvited party constitutes a taking.

In sum, a building owner does not automatically lose his constitutional right to be protected against a *Loretto*-style taking simply by entering into

⁶ It should be noted that the Supreme Court in *Loretto* chose not to "hazard an opinion" on the respective rights of the tenant and the owner to the use of the rooftop of Ms. Loretto's building, as that opinion was not necessary because the New York law at issue did not require the landlord to provide cable installation "if the tenant so desires," but simply required the landlord to have the cables installed irrespective of any tenant's desires. See *Loretto*, 458 U.S. at 439, n. 18 and n. 19. Nevertheless, it is obvious that underlying

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commercial agreements to allow certain parties access to his property, but rather is free to retain his constitutional right to exclude other people from his property – the “most treasured strand[]” in his bundle of property rights. *Loretto*, 458 U.S. at 435. With that strand come all the protections of *Loretto*, which require just compensation to be paid as soon as the right to exclude is permanently lost.

(2) A Nondiscriminatory Access Rule Can Only Be Understood As A Forced Access Rule, And Cannot Properly Be Categorized As A Regulation Of The Lessor-Lessee Economic Relationship

Once it is understood that a nondiscriminatory access rule will violate the state and local property rights of at least some building owners notwithstanding their prior arrangements to allow access to certain specific carriers, it becomes clear that such a rule would constitute a physical occupation mandate that is indistinguishable from *Loretto*. Indeed, any rule that mandates rights to an additional physical occupation of the landowner’s property (beyond those already created or agreed to by operation of local property law), falls squarely within the purview of *Loretto*, and in no way approaches the borderland where the doctrine of *Loretto* runs into the doctrine of regulatory takings.

Five years after declaring the *per se* takings rule in *Loretto*, the Supreme Court had an opportunity to define the boundary between a *per se* taking and a regulatory taking. In *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), the Court

the decision in *Loretto* was the assumption that Ms. Loretto had a property interest in the rooftop which

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ruled that an FCC order under the Pole Attachment Act that restricted the rates a utility could charge cable companies for use of its poles did not violate the Takings Clause. The Court distinguished *Loretto* based on the fact that “nothing in the Pole Attachment Act as interpreted by the FCC . . . [gave] cable companies any right to occupy space on utility poles, or prohibited utility companies from refusing to enter into attachment agreements with cable operators.” *Id.* at 251-52. Instead, the rate restrictions had to be analyzed under “traditional Fifth Amendment standards,” which dictate that “regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible” because “investors’ interests provide only one of the variables in the constitutional calculus of reasonableness.” *Id.* at 253 (citation omitted).

The principle behind the result in *Florida Power* is that the regulation of the economic terms of a relationship with a particular invitee may not always be subject to the *per se* rule. Nevertheless, it would do no good to describe a requirement that other parties be allowed permanent access as an “economic term” in order to bootstrap *Loretto* facts into the holding of *Florida Power*. To begin with, *Loretto* itself rejected such an approach when it refused to agree that the forced access statute in that case could be avoided by not renting out the building to tenants. The Court responded to this argument in a footnote, stating:

included the right to exclude the cable company’s equipment.

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“The right of a property owner to exclude a stranger’s physical occupation of his land cannot be so easily manipulated.” *Loretto*, 458 U.S. at 439, n. 16. Secondly, attempting to squeeze a nondiscriminatory access rule into the holding of *Florida Power* misunderstands the difference between economic terms and physical occupation. The Supreme Court has best summarized the distinction as follows: “The line which separates these cases [such as *Florida Power*] from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.” *Florida Power*, 480 U.S. at 252-53. See also *Yee v. City of Escondido*, 503 U.S. 519, 528 (finding that *Loretto* did not apply to a local rent control ordinance because “[p]ut bluntly, no government has required any physical invasion of petitioners’ property.”).

Because the NPRM proposes rules that are designed to provide telecommunications carriers greater access to multiple tenant environments, both through a potentially broad-based nondiscrimination requirement as well as through more specific measures, it is an attempt to authorize physical presence, rather than an attempt to regulate economic terms. As a result, the proposed restrictions in the NPRM fall plainly on the *Loretto* side of the line articulated in *Florida Power*, and its proposals must be analyzed under the *per se* test, not under the regulatory takings balancing test. The decisions in *Florida Power* and *Yee v. Escondido*, both of which deal with the economic terms of a relationship between a landowner and a “commercial lessee,” rather than with the rights of an

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“interloper” to use government authority to gain access, are therefore both inapposite to determining whether the proposals in the NPRM would constitute a taking.

(B) At Least Three Specific Proposals Contained In The NPRM Will Give Rise To A Taking Of Property Under The Fifth Amendment

While there are several proposals in the NPRM that might, under certain circumstances, implicate the Fifth Amendment rights of building owners, at least three specific proposals will effect a taking of private property under the Takings Clause, which will thereby trigger the questions of whether the Commission had statutory authority to issue such rules, and of how the private property owners should be compensated.

(1) The NPRM’s Proposed Rule Requiring Building Owners To Allow Access To Any Telecommunications Provider To Their Premises On Nondiscriminatory Terms Would Constitute A Taking Of Property

In Paragraph 58 of the NPRM, the Commission asks “for comment on whether there would be any constitutional impediment to our adoption and enforcement of a nondiscrimination requirement.” *See generally* NPRM, ¶ 58-60. As summarized in the NPRM, the nondiscrimination requirement would state that “building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms, and conditions.” NPRM, ¶ 53. We believe that the Takings Clause, properly understood, would apply to

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such a requirement, thereby certainly creating a “constitutional impediment” to its adoption and enforcement.

As already explained, the mere fact that a building owner has invited a single carrier onto his property in no way relinquishes the owner’s right to exclude others from his property. Under virtually universal state and local property law principles, the terms of the arrangement with the telecommunications provider who was specifically granted access would determine whether or not the building owner had ceded his rights to exclude any other providers. In the absence of a very clear cession of rights, the building owner could not be forced to acquiesce to the presence of any and all other providers without triggering a *per se* application of the Takings Clause under *Loretto*. Notwithstanding the importance of the Commission’s goal of expanding the nation’s telecommunications infrastructure, a nondiscrimination requirement simply cannot be made to “piggyback” on prior specific access arrangements without taking the property rights of the building owners.

Indeed, in a directly analogous context, a federal court has held such a requirement to constitute a *Loretto* taking. In *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), the court considered an FCC rule requiring that “a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” *Id.* at 1388 (quoting 47 U.S.C. § 224(f)(1)). After discussing